NO. 33873

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DARRELL V. McGRAW, JR., ATTORNEY GENERAL, ex rel. STATE OF WEST VIRGINIA; THE WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY; and THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Appellants/Plaintiffs Below,

v.

THE AMERICAN TOBACCO COMPANY, et al.,

Appellees/Defendants Below.

APPELLANT'S REPLY TO OPMS' BRIEF AND SPMS' BRIEF

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APPELLANT'S REPLY TO OPMS' BRIEF AND SPMS' BRIEF

Appellants, (hereinafter referred to as "the State") upon reviewing the briefs of the OPMs, and SPMs, (hereinafter collectively referred to as "PMs") noticed that their briefs concentrate on the issue as to whether the current dispute is subject to arbitration. The secondary issue is whether the current dispute, including a determination as to whether the State diligently enforced its qualifying statute, should be resolved by arbitration **before one nationwide panel of three former federal judges**. The remaining issue is whether the June 2003 settlement agreements resolved the 2003 diligent enforcement question and whether that issue is arbitrable.

I. THE DISPUTES

The dispute as described by the OPMs relates to the Independent Auditor's (hereinafter, "Auditor") determination that it would not apply the 2003 NPM Adjustment to the OPMs' April 17, 2006 payments based on a presumption that the States were diligently enforcing their qualifying statutes and, therefore, were exempt from the NPM Adjustment. The OPMs disputed that determination and the National Association of Attorneys General (NAAG), which represented the

Settling States, defended it. Accordingly, the OPMs served notice that they disputed the Auditor's determination and requested that the State arbitrate the parties' dispute pursuant to Section XI(c) of the MSA.

The SPMs defined the issue to be decided on this appeal as, "whether the dispute between the PMs and the Settling States, including West Virginia, must be arbitrated." (*See* SPMs' Brief, p. 1.)

Another dispute between the parties is whether the issue of the State's diligent enforcement of its model statute during calendar year 2003, which is the underlying issue in this case, has already been resolved as between the State and the major tobacco companies, Philip Morris, RJR, and Lorillard, in separate 2003 June settlement agreements. The MSA plainly provides that, while the amount of a tobacco company's payment in a particular year is calculated by reference to the company's sales during that year, the tobacco company's entitlement to an NPM Adjustment turns **not** on a state's diligence **with respect to sales during that year**, but rather on a state's diligence **during that year**. The correct resolution of the issue turns entirely on this subtle difference as will more fully be explained later in this brief. The determination of this issue involves an interpretation of the settlement agreements and is not arbitrable as the OPMs contend.

II. NARROWING THE ISSUES

The State agrees that the Auditor's refusal to apply the 2003 NPM Adjustment to the PMs' April 17, 2006 annual payment is subject to arbitration and must be arbitrated. The State further agrees that the Auditor's ultimate decision, whether West Virginia is entitled to the NPM exemption for enacting the qualifying statute and diligently enforcing it as provided in the MSA, is also subject to arbitration but contends that the State is entitled to that determination by the Auditor under the

framework of the MSA before being required to arbitrate the matter.[1] The State does not agree, however, that the plain language of the MSA requires that the parties' dispute, as herein defined, and any dispute as to whether West Virginia diligently enforced its model statute be submitted to binding arbitration **before a nationwide panel of three former federal judges**.

In order to narrow the focus of the issues that will be argued before the Court the State, for the purposes of this reply brief and for argument before the Court, concedes that the following positions of the PMs are correct:

1. The current dispute relating to the Auditor's determination not to apply the 2003 NPM adjustment to the March 6, 2006 payment is arbitrable . (*See* OPMs' Brief, p. 2.)
2. The Auditor's decision to presume that the State and the other Settling States had diligently enforced their model statues as it had done in prior years instead of making a decision for each State on the merits as required by the MSA is arbitrable.
3. The Auditor has the authority and is required under the MSA to determine each year whether to apply the NPM Adjustment and whether the State and the other Settling States are or are not entitled to the diligent enforcement exemption to that adjustment.[2]

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[1] This is comparable to the argument that a claimant must exhaust his administrative remedies before he can file suit in court. Here, the Auditor is required by the MSA to determine whether the State diligently enforced its qualifying statute and is therefore entitled to the exemption from the NPM Adjustment. It is mandatory that the Auditor make this determination before the diligent enforcement issue becomes arbitrable.

[2] The State has previously argued that because the Auditor refused to determine whether West Virginia was entitled to the NPM exemption on the grounds that it was not charged with that responsibility and was not qualified and competent to make such a determination, the MSA court

III. THE PMS INCORRECTLY CHARACTERIZE WEST VIRGINIA'S ENTITLEMENT TO AN EXEMPTION AS A DEFENSE INSTEAD OF A CONTRACTUAL RIGHT WHICH IS PART OF THE BARGAIN STRUCK BY THE PARTIES

The PMs refer to the State's position that it is not subject to the NPM Adjustment, because the State has diligently enforced its model statute as a defense.[3] It should be clearly understood that the State's contention that it is not subject to the NPM Adjustment is based on an exemption provided in the MSA by having diligently enforced its model statute.[4] That is not a defense; it is a contractual right to an exemption to the NPM Adjustment provided for in the MSA and was promised to the States by the PMs as an inducement to get the States to level the playing field by enforcing their qualifying statutes against the NPMs. For the PMs and the Circuit Court to characterize the diligent enforcement exemption as a defense gives it a negative connotation and implies that it is a technical legal defense. By mischaracterizing the diligent enforcement exemption as a defense, it prejudices the State in making its presentation in an arbitration proceeding by giving the impression that the State is seeking a setoff rather than a contractual entitlement that was bargained for and agreed to in the MSA. Therefore, Judge Berger erroneously ruled that the State's diligent enforcement was a defense to be decided by the nationwide panel of arbitrators.

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was the proper forum to make that determination. Once the MSA court determined whether or not the State was entitled to the NPM exemption, the Auditor would then make its determination whether or not to apply the NPM exemption to the State's allocated payment in which case if there were a dispute as to that determination, it would then be subject to arbitration.

[3] The Circuit Court's Order also refers to the State's claim to the diligent enforcement exemption as a defense. Order at 2-3, R. 328.

[4] Model statute and qualifying statute are interchangeable terms which are used by the parties.

IV. THE PMS AGREE THAT A SETTLING STATE MAY AVOID ITS SHARE OF THE NPM ADJUSTMENT BY DEMONSTRATING TO THE AUDITOR THAT IT DILIGENTLY ENFORCED ITS QUALIFYING STATUTE

The PMs have vigorously argued and the Circuit Court of Kanawha County has found that the Auditor is required under the MSA to make a determination as to whether the State and the other Settling States did or did not diligently enforce its model statute.[5]

The OPMs described the role of the Auditor and the diligent enforcement exemption in its brief as follows:

> One of the Adjustments the Auditor must determine each year is the NPM Adjustment, which reduces PMs' payments in compensation for their "Market Share Loss" to companies not subject to the MSA's marketing restrictions and payment obligations ("Non-Participating Manufacturers" or "NPMs"). MSA Section IX(d)(1) provides that the Adjustment "shall apply" if (a) the PMs collectively lose more than two percent of their pre-MSA market share to NPMs, and (b) an economic consulting firm determines the MSA was a "significant factor" contributing to that loss. *See* MSA § IX(d)(1), (d)(2)(A), [pp. 58-63] R. 79.
>
> MSA Section IX(d)(2) sets forth how the Auditor is to allocate the NPM Adjustment among the States, and states the general rule that the Adjustment "shall apply to the Allocated Payments of all Settling States." [p. 63] R. 79. **The only exception is where a State shows it "diligently enforced" a statute imposing similar payment obligations on NPMs (a "Qualifying Statute," attached to the MSA as Exhibit T, R. 79).** MSA § IX(d)(2)(B), [pp. 63-64] R. 79.[6]
>
> The MSA's drafters anticipated that unless the States enacted and diligently enforced such statutes, the MSA would place PMs at a significant cost disadvantage

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[5] The Court Order provides in relevant part as follows: "subsection IX(d)(2) sets forth how the NPM Adjustment is to be allocated among the Settling States, including the exemption for any State that the Auditor determines is diligently enforcing its Qualifying Statute. **Accordingly, the MSA not only authorizes but requires the Auditor to determine each year whether the NPM Adjustment and the diligent enforcement exemption to that Adjustment apply.**" Order at 3, R. 328 (emphasis added).

[6] West Virginia, like other States, adopted the Model Statute set forth in Exhibit T to the MSA. *See* W. Va. Code § 16-9B-1 *et seq.*

> vis-a-vis NPMs and cause PMs to lose market share to NPMs. This in turn would reduce PMs' annual payments to the States. *See* [MSA Exhibit T at 1] R. 79. **To create an incentive for States to enact and enforce such statutes, the MSA provides that a State's "Allocated Payment" shall not be subject to the NPM Adjustment if that State "continuously had a Qualifying Statute . . . and diligently enforced the provisions of such statute."** MSA § IX(d)(2)(B), [p. 63] R. 79. **If a State qualifies for this exemption, the Auditor must reallocate that State's share of the NPM Adjustment among the States that do not qualify, "pro rata in proportion to their respective Allocable Shares."** MSA § IX(d)(2)(C), [p. 64] R. 79.

OPMs' Brief, pp. 3-4 (emphasis added).

Whenever the Auditor determines that the PMs have sustained a market share loss and that the NPM Adjustment shall apply and the Economic Consulting Firm has determined that the MSA was a significant factor contributing to that loss, the Auditor shall apply the NPM Adjustment among the States, including the State of West Virginia, **unless the State qualifies for the exemption by showing that it diligently enforced its model statute**. SPMs argue that the State has the burden of proving that it diligently enforced its model statute. (*See* SPMs' Brief, p. 19.) The question is, how does a State show that it is entitled to the diligent enforcement exemption because it diligently enforced its model statute? The PMs have answered this question as follows:

> A Settling State may avoid its share of a given year's NPM Adjustment **by demonstrating to the Auditor** that it "diligently enforced" a "Qualifying Statute" (*i.e.*, a statute in the form of Exhibit T to the MSA that imposes an escrow obligation on NPMs roughly equivalent to the payments they would owe if they signed the MSA).

See Respondents' Original Participating Manufacturers' Opposition to the Petition for Allowance of Appeal, p. 3 (emphasis added).

However, as one can see, the State has a contractual right under the MSA to avoid its share of the 2003 NPM Adjustment **by demonstrating to the Auditor** that it diligently enforced its

qualifying statute. The Auditor is required under the MSA to make that determination. The Auditor would receive information from the State supporting the State's contention that it diligently enforced its model statute and would likewise receive information from the PMs that they would offer to show that the State did not diligently enforce its model statue.[7] The Auditor would then make its decision, which would be binding unless the State or the PMs disputed the Auditor's decision. In the event of a dispute, either the State or the PMs would have the right to demand arbitration under the Auditor's binding arbitration clause.

The manner set forth above is how the State and the PMs agreed in the MSA that the issue of diligent enforcement would be decided. The reason that the Auditor did not make a determination as to whether the State did or did not diligently enforce its model statute is that the Auditor refused to make such a diligent enforcement determination. The Auditor stated:

> The Independent Auditor is **not charged** with the responsibility under the MSA of making a determination regarding [the diligent enforcement] issue. More importantly, the Independent Auditor is **not qualified to make the legal determination as to whether any particular Settling State has "diligently enforced"** its Qualifying Statute. Additionally, the Independent Auditor is aware of certain litigation that is ongoing related to this issue. Until such time as the parties resolve this issue or the issue is resolved by a trier of fact, the Independent Auditor will not modify its current approach to the calculation.

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[7] The Auditor, in its Notice Regarding Disputes of the Final Calculation, dated April 13, 2004, for the MSA Payments due April 15, 2004 (Notice ID: 0140), acknowledged that its engagement letter, dated May 25, 2000, provides that in the event of a dispute among one or more parties to the MSA, the Auditor will determine and administer the initial dispute resolution process. The Auditor pointed out that in order to identify and clarify those issues with respect to which disputes might exist and as a process to facilitate possible resolution of disputed issues, the Auditor requested and collected information from various parties, including meeting with numerous representatives in Houston, Texas on March 22, 2004. However, even in this Notice the Auditor put the parties on notice that it could not decide disputes as to whether certain PMs were entitled to the NPM Adjustment for the calendar year 2003. The Auditor stated, "[w]e do not believe that the Independent Auditor has been engaged or is authorized to resolve such disputes including, without limitation, determining the amounts in dispute." Notice ID: 0140, p. 1.

Notice ID: 0185, p. 5, Mar. 7, 2006 (emphasis added), State's Exhibit 1, R. at 162.

When the Auditor refused to decide whether West Virginia diligently enforced its qualify statute in derogation of the plain language of the MSA, it left the State with no alternative means of obtaining such a determination except for the option of filing a Motion for Declaratory Judgment in the MSA court, which it did.

The Auditor, contrary to its responsibility to determine whether the State did or did not diligently enforce its qualifying statute so that the State would know whether it was or was not entitled to the exemption from the NPM Adjustment as provided in the MSA, did what it had done in years past by declaring that it was going to presume that the State and all other Settling States had qualifying statues in full force and effect for the entire 2003 year and had diligently enforced its model statute. The Auditor therefore refused to apply the 2003 NPM Adjustment to the April 17, 2006 annual payment.

V. PMS' CONTENTION THAT AUDITOR'S REFUSAL TO DECIDE DILIGENT ENFORCEMENT REQUIRES ONE NATIONWIDE PANEL OF THREE FORMER FEDERAL JUDGES IS WRONG

The PMs argue that because the Auditor refused to make the determination as to whether the State did or did not diligently enforce its model statute, the State will not have the benefit of what it negotiated, bargained for, and agreed to, but will be required to arbitrate whether the State diligently enforced its model statute along with all of the 51 other Settling States in a single proceeding before a nationwide panel of three former federal judges in order to determine whether it will be entitled to the exemption provided for in the MSA.

Furthermore, it is respectfully submitted that there is absolutely nothing in the MSA that provides for resolving this matter in a single proceeding in some unknown location before a nationwide panel of three former federal judges. As the PMs have articulated in their brief, the Auditor was required to make the diligent enforcement decision for the State and if the Auditor's decision was disputed by the PMs or by the State, then it would proceed to arbitration.

There is no alternative procedure for making the diligent enforcement determination when the Auditor refused to make the initial determination. For the Circuit Court to allow the Auditor to renege on its contractual responsibility to decide whether the State diligently enforced its qualifying statute by simply acknowledging that the State and the other Settling States had enacted the qualifying statute and had them in full force and effect for the entire year in 2003 and by presuming that the State diligently enforced its qualifying statute, denied the State of a valuable contract right. The State was not able to demonstrate or show to the Auditor that it had diligently enforced its qualifying statue and was entitled to be exempt from the NPM Adjustment. Had the Auditor made the diligent enforcement decision, as it was required by the MSA to do, the State would have been entitled to the exemption unless the PMs disputed the Auditor's decision. The Circuit Court simply ignored the Auditor's breach of its contracted responsibility under the MSA and ruled that the parties' dispute concerning the 2003 NPM Adjustment, including the State's claim that it diligently enforced its Qualifying Statute and is therefore exempt from the NPM Adjustment, must be arbitrated under the MSA's plain language before one nationwide arbitration panel of three former federal judges. Order at 2-3, R. 328. The lower Court not only ignored what the MSA required the Auditor to do, even though the Court set forth that requirement in its Order, it ordered an arbitration of the diligent enforcement issue before one nationwide panel of three former federal judges; a result

that was not negotiated for, bargained for or agreed to by the parties to the MSA. Instead of the plain language of the MSA dictating this result, the lower Court in effect rewrote the MSA to reach this result. No Attorney General ever envisioned being required to litigate the diligent enforcement issue before one nationwide arbitration forum competing with all of the other 51 Settling States for a determination that it diligently enforced its Qualifying Statute. If the parties did not bargain and agree to this type of resolution of the diligent enforcement issue, this Court should reverse the Circuit Court's decision and remand it back to the Circuit Court directing it to order the Parties to instruct the Auditor to make the initial decision on diligent enforcement for the State as required by the MSA.

VI. THE CIRCUIT COURT OF KANAWHA COUNTY (BERGER, J.) ERRED WHEN IT HELD THAT THE MSA'S ARBITRATION CLAUSE "MUST BE ARBITRATED UNDER THE MSA'S PLAIN LANGUAGE BEFORE ONE NATIONWIDE ARBITRATION PANEL OF THREE FORMER FEDERAL JUDGES." Order at 2-3, R. 327-28.

The Circuit Court of Kanawha County ruled that the parties' dispute, including the determination as to whether the State did or did not diligently enforce its qualifying statute, must be arbitrated under the MSA's plain language before one nationwide arbitration panel of three former federal judges. As a matter of fact, the Court's entire reference to this part of its holding is stated in one sentence as follows: "The Parties' dispute concerning the 2003 NPM Adjustment, including the State's defense that it diligently enforced its 'Qualifying Statute' and is therefore exempt from the NPM Adjustment, must be arbitrated under the MSA's plain language **before one nationwide arbitration panel of three former federal judges**." Order at 2-3, R. 328 (emphasis added).

The Court does not set forth in its Order its analysis as to how it arrived at its decision that the MSA's plain language required the parties' disputes to be arbitrated before one nationwide arbitration panel of three former federal judges. The word **nationwide** is not found in the resolution of disputes section of the MSA or mentioned in regard to the mandatory arbitration provisions in any part of the MSA. The PMs in their brief insert the word "nationwide" between the words "a" and "panel" (a **nationwide** panel) which of course makes it look like the MSA requires a resolution of the calculations or determinations made by the Auditor before one nationwide panel of three former federal judges.

A. Each of the Two Sides Shall Select One Arbitrator

The PMs in its brief make the following argument to support the Court's Order:

> The State's assertion that the MSA does not require arbitration before a single nationwide arbitration panel (Br. at 21-30) is likewise refuted by the plain language of the agreement. Section XI(c) expressly provides that "**[e]ach of the two *sides* to the *dispute* shall select one arbitrator.**" MSA § XI(c), [p. 88] R. 79 (emphasis added). The MSA does not provide that "each State" or "each Participating Manufacturer" selects its own arbitration panel or that there will be separate arbitration panels for each "issue." Rather, "the MSA **refers to the two sides to this agreement settling their disputes by choosing one arbitrator for each side.** Those two sides are (1) **the PMs (which contend they are entitled to an NPM Adjustment)** and (2) **the Settling States (which contend that no NPM Adjustment can be applied.**" *Indiana* II, 879 N.E.2d at 1220.

PMs' Brief, p. 31 (emphasis added).

The PMs contend that the language, "each of the two sides to the dispute shall select one arbitrator," contained in the MSA refers to the two sides of the MSA settling their disputes by choosing one arbitrator for each side. Under the PMs' interpretation, in any dispute the PMs would

constitute one side and the Settling States would constitute the other side. This is ridiculous on its face.[8]

The Circuit Court, in holding that all 52 Settling States are a single "side" in the dispute concerning the State's diligent enforcement of its model statute, implicitly construed the term "side," as used in the MSA, in a manner that cannot be squared with either the common or legal understanding of that term. Parties are not on the same "side" if there is significant adversity of interest among them, and such adversity exists among the 52 Settling States and territories on the issue of the State's diligent enforcement.

The State contends that it is a "side" to any dispute concerning its own diligence, and that, therefore, if the dispute must be arbitrated, the State has a right to select an arbitrator. Meanwhile, consistent with that view, the PMs have asserted that the interests of the 52 Settling States and territories are, in fact, **divergent**, and, indeed, the PMs have cited this divergence of interest as a reason that the issue should be arbitrated in the first place. This asserted divergence of interest is the cornerstone of the PMs' argument in favor of nationwide arbitration of the diligent enforcement issue.

The issue of how to define the term "side" in Section XI(c), and of whether the State has a right to select an arbitrator in any dispute concerning its own diligence, is of paramount importance to the State, and to this Court in order to decide whether the MSA requires a single nationwide arbitration proceeding for all 52 parties to resolve the diligent enforcement issue.

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[8] The Auditor, in its April 13, 2004 Notice Regarding Disputes of the Final Calculation for the MSA Payments Due April 15, 2004, points out that its "engagement letter, dated May 25, 2000, provides that in the event of a dispute **among one or more parties** to the MSA, the Independent Auditor will determine and administer the initial dispute resolution process." Notice ID: 0140, p. 1 (emphasis added).

In any event, on the merits, the State must, as a matter of contractual interpretation, be regarded a "side" in any dispute concerning its own diligent enforcement of its model statute. The Court's implicit decision that all 52 Settling States and territories are one "side" in that dispute is not consistent with the ordinary or legal understanding of the term "side." The States cannot be regarded as one "side," because, as the PMs themselves have argued, there is a strong potential for adversity of interest among the Settling States on the question of whether the State was diligent, and because parties with adverse interests in a dispute are not ordinarily understood to be on the same "side" of that dispute.

The text of the MSA provides no authority for the PMs' contention that any arbitration on the NPM adjustment must treat all 52 states as constituting one claim. It is apparent from the MSA itself that each state constitutes one "side" in any dispute concerning its own diligence, because the MSA does not provide a mechanism for a group of states to agree on a single arbitrator.

The State must be considered a "side" in any dispute concerning its own diligence, not only on grounds of contract interpretation, but also on grounds of policy and basic fairness. Neither the language or structure of the MSA, nor any other valid consideration, permits a reading of Section XI(c) of the MSA under which the State could be considered on the same "side" of a dispute with parties whose interests are adverse to the State.

In the beginning of this reply brief, the State, for the purposes of this reply brief, conceded that the underlying dispute is arbitrable and is no longer under debate. What is under debate is whether the above language set forth in the MSA referring to the two sides to the dispute is the same in each and every circumstance and whether the plain language of the MSA requires the arbitration

to be decided by a single nationwide panel of three former federal judges in each and every circumstance.

The current dispute relating to the Auditor's determination not to apply the 2003 NPM Adjustment to the March 6, 2006 payment based on the Auditor's finding that each of the Settling States had adopted a model statute that was continuously in effect during 2003 and therefore made a presumption that each of the Settling States had diligently enforced their model statutes, is not only subject to arbitration but does fit the definition of the two sides to the dispute as advocated by the PMs. In regard to this dispute, however, there is no conflict of interest among the PMs or among the Settling States; the facts in regard to deciding the dispute by the arbitration panel do not vary among the States and the decision of the arbitration panel will affect all of the States equally. For instance, a decision by the arbitrators that the Auditor was required to apply the 2003 NPM Adjustment to the March 6, 2006 payment until the Auditor determined which States, if any, were entitled to be exempted from the NPM Adjustment based upon the Auditor's determination that each State did or did not diligently enforce its model statute and that the Auditor was not authorized under the MSA to make a presumption as to diligent enforcement by the Settling States, would affect all of the Settling States equally. It would not be necessary for there to be more than one arbitration proceeding to decide those issues and one arbitration proceeding would be binding on all the States provided that each of the Settling States had notice of the arbitration proceeding and had an opportunity to participate therein.[9] There would be no difficulty with the States choosing an arbitrator in such case through the assistance of NAAG because there is no conflict of interest among

[9] Multiple arbitration proceeding involving the same parties, the same issues and the same facts with no divergent interests between the parties on either side, would be barred by res judicata, judicial estoppel, or collateral estoppel.

the States that would prevent them from choosing one arbitrator to represent all of their collective interests. In the event the foregoing decision would actually be the decision of the arbitration panel, then the matter would be remanded to the Auditor so that the Auditor could fulfill his contractual obligation under the MSA and determine whether the State and each of the other Settling States are or are not entitled to the diligent enforcement exemption to the NPM Adjustment.

The determination of the NPM Adjustment exemption for West Virginia and the other States by the Auditor is different from the circumstances described above. First, as determined by the Court below, the Auditor has the authority and is required under the MSA to determine each year whether the State and the other Settling States are or are not entitled to the diligent enforcement exemption to that adjustment. The State and the other Settling States as contemplated by the MSA could avoid its share of the 2003 NPM Adjustment by demonstrating to the Auditor that it diligently enforced its qualifying statute. Had the Auditor permitted West Virginia to demonstrate that it had diligently enforced its qualifying statute and the Auditor made such a determination, then it would be up to the PMs to either concur with that result or to dispute it. In that case, the PMs who disputed the Auditor's decision would be one side and the State would be the other side. The two sides to the dispute would then select one arbitrator and proceed with the arbitration procedure as provided in the MSA. This circumstance though is completely different from the decisions made by the Auditor in the underlying dispute that is currently arbitrable. For instance, the Auditor's determination as to whether the State did or did not diligently enforce its qualifying statute is based totally upon what the State did or did not do and not based on any action or inaction by the other Settling States. That is, the Auditor's decision as to the State would be fact specific to what the State did or did not do to diligently enforce its model statute. The facts would vary from State to State. For example, each

State's tax laws are different. Some States would tax roll-your-own cigarettes while other States would not. Some States' tax laws would have exemptions for cigarettes sold on Indian reservations while other States would not. Some States would have a fairly large market for NPM cigarette sales while other States would have very small markets. The percentage of NPM cigarette sales in relation to the total cigarette sales will vary from State to State. The Auditor has to determine the meaning of the words "diligent enforcement" in order to make its determination for the State and the other Settling States the same as it had to determine the meaning of the words "market share loss" in order to make that determination. In much the same way, the Economic Firm had to determine the meaning of the words "significant factor" in making its determination as to whether the MSA was a significant factor in the resulting market loss. While the MSA spells out in detail the procedure for the Auditor to determine the market share loss and the procedure for the Economic Consulting Firm to determine whether the MSA was a significant factor in the market share loss, it does not provide any direction as to how the Auditor is to determine whether the State and the other Settling States diligently enforced their model statutes. The only fact that we can agree on is that the MSA requires the Auditor to determine whether the State and the other Settling States are entitled to the exemption from the NPM Adjustment because the State or the other Settling States diligently enforced its model statute.

Another difference in regard to the issue of diligent enforcement being determined before a single nationwide panel of three former federal judges is in regard to the selection of the arbitrator for the Settling States. The PMs in their brief quote the Massachusetts Court as saying, "'[s]ince the granting of an exemption by one settling state will automatically lead to the reallocation of its allocated portion of the NPM adjustment to all other non-exempt settling states, each governmental

signatory has its own self-interest at stake in the outcome of this issue, which is necessarily in conflict with every other state.'" *See* OPMs' brief, p. 28, quoting *Commonwealth v. Philip Morris, Inc.*, 864 N.E.2d 505, 512-13 (Mass. 2007). The PMs argue that is a critical factor in mandating that the States' diligent enforcement issue be resolved in a single, nationwide proceeding. The PMs contemplate that the State and the other Settling States will be competing with each other for a limited number of diligent enforcement certifications. Steve Patton, Esquire, argued in the lower Court that the procedure is similar to the game of musical chairs; when the music stops someone is going to be left standing. *See* Transcript of Kanawha County Circuit Court proceeding held on December 18, 2006, p. 15. Thus, the PMs argue that because of such conflict, the States' diligence must be resolved under one clear set of rules that apply with equal force to every Settling State.

The conflict between the States will increase when the arbitrators create national standards to determine diligent enforcement in a single nationwide proceeding because the States will be compared to each other and the arbitrators will be grading the States on a curve. Guess which States will be on the lower end of the curve. The State's allocable share of the PMs' total payment is 0.89% or approximately 58 million dollars. Its share of the 1.2 billion NPM Adjustment is approximately 11 million dollars with the potential to lose its entire 58 million dollar allocable share. How will the State be able to compete with New York with an allocable share of 12.76%; California with an allocable share of 12.76%; Ohio with an allocable share of 5.04%; Maryland with an allocable share of 2.26%; Pennsylvania with an allocable share of 5.75%; or Virginia with an allocable share of 2.04%.

It has been argued that some States will even file cross-claims against other States and, therefore, the single nationwide arbitration panel to decide the diligent enforcement issue is

necessary to allow the States to protect their own self-interests. However, when it comes to picking an arbitrator, how can it be said that the States constitute one side on the diligent enforcement issue? When one State's self-interest is in conflict with every other State's self-interest, how could they possibly agree upon an arbitrator to fairly represent all of their interests and how could an arbitrator protect the self-interest of the State when by doing so it may have an adverse impact on every other State? This problem does not exist with the underlying dispute that the State agrees can be resolved in one arbitration proceeding as previously set forth herein. There the interest of the States are the same. The issue at stake is whether the decision of the Auditor to not apply the NPM Adjustment to the April 17, 2006 payment was correct and whether the Auditor's decision to presume that every State diligently enforced its model statute was correct. The evidence from all 52 parties would be the same. The arbitration decision will affect all 52 parties the same and will not benefit some and harm others. NAAG in these circumstances could pick the arbitrator and represent the interests of all the 52 parties fairly and without conflict. The same cannot be said for the resolution of the diligent enforcement issue. In resolving whether the State and the other States diligently enforced their statutes, it is up to each State to show the Auditor that it diligently enforced its statute. Most of the facts will be State specific to each individual State based upon what that State did or did not do. The Auditor and, eventually, the arbitration panel, will have to receive evidence from each of the 52 parties to the MSA to make a just and fair determination. Each State will have to have its own legal representative. Neither NAAG nor any other legal entity could fairly represent the interests of all the parties in the diligent enforcement dispute. Finally, since each State's self-interest is in conflict with every other State, each State should be permitted to choose its own arbitrator. It would

be unrealistic to believe that all of the States would be able to agree upon one arbitrator who could fairly represent all of their interests in making the diligent enforcement determinations.

The State and many other Settling States have other divergent interests in opposition to a single nationwide arbitration that may preclude them from operating as one "side" to an agreement. The MSA drafters recognized that an attempt at any universal decision making in this area risks confusion and injustice and, therefore, did not provide language dictating a single nationwide arbitration procedure. For example, different States have varying traditions on how they enforce tax and related laws. Depending on the size of the State and/or the nature of any non-compliant NPMs, different means of measuring enforcement may be appropriate. States might have different standards of conduct for public officials, methods of establishing conduct, or definitions of key terms. States certainly have different resources available to them. Indeed, even in the realm of MSA enforcement, there are different State standards. Some States have cigarette fire laws that impact on qualifying statute enforcement while others do not. States may have different standards or definitions of terms related to the MSA, including advertising terms. States may have very divergent reasons for preferring one arbitrator over another. All of these realities will factor into whether a particular State will elect a particular arbitrator or even agree to elect an arbitrator to represent all of the States. No State's decision as to which arbitrator is best suited to its particular set of circumstances or the timing or procedures of a particular arbitration is likely to be acceptable to the other Settling States. All of this reaffirms the State's argument that under the circumstances for determining diligent enforcement, it is unreasonable to think that the Settling States can agree on one arbitrator and that one arbitrator can represent the interests of all of the Settling States.

The PMs argue that having 52 separate arbitration proceedings could lead to chaos. This argument is disingenuous because there would be no need to have 52 separate arbitration proceedings. The State and the other States would demonstrate to the Auditor that they diligently enforced their statutes. The Auditor would make his decision as to all of the States. The only States who would dispute the Auditor's decision and demand arbitration would be those States that the Auditor decided did not diligently enforce their model statutes. It would be unrealistic to believe that the PMs could, in good faith, dispute the Auditor's decision for every State that it decided did diligently enforce its model statute. Therefore, the only States that would be in arbitration proceedings would be those who were declared to have not diligently enforced their model statutes and those States who were declared to have diligently enforced their model statutes and the Auditor's decision was disputed by the PMs. In reality, this would be a small number of the 52 parties to the MSA. State specific arbitration proceedings will not create chaos. The various determinations of the separate States' diligent enforcement will be handed to a single Independent Auditor, which then will simply apply those determinations in a uniform fashion to determine each State's payments. Nor would separate proceedings result in different standards applied to each state's enforcement obligations. Different standards already exist, because the determination for each separate Settling State will be made upon consideration of each separate State's laws. MSA § XVIII(n). Chaos instead would result if States were thrown together for a single national proceeding for 52 separate determinations of diligent enforcement, where each State would have the incentive to point fingers at other States.[10]

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[10] The only arbitration relating to diligent enforcement would involve those Settling States where there was an actual dispute over their enforcement efforts. The only participants would be the State and any parties who disputed the Auditor's determination that the State did or did not

The bottom line is that the way the State could avoid the NPM Adjustment as provided in the MSA was to come forward and show the Auditor that it diligently enforced its statute. The Auditor would make its decision and if the decision were in favor of the State, the PMs would dispute the Auditor's decision. The dispute as to the State would be between the State and the PMs. The State would be one side to the dispute and the PMs would be the other side. The State and the PMs would each chose an arbitrator and then proceed with the arbitration proceeding. This is a relatively simple procedure and should be resolved rather quickly.

VII. THE STATE HAS DILIGENTLY ENFORCED ITS MODEL STATUTE AND SHOULD BE PERMITTED TO ACCESS A FORUM TO QUICKLY DECIDE THAT ISSUE SO THAT THE CITIZENS OF THE STATE OF WEST VIRGINIA ARE NOT WRONGFULLY DEPRIVED OF THE USE OF ITS TOBACCO MONEY

It is established law that the MSA is a contract that deeply affects the public interest. As the United States Supreme Court has observed, the MSA is a "landmark" public health agreement that addresses "one of the most troubling public health problems facing our Nation today." *Lorillard*

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diligently enforce. The OPMs have refused to declare whether they dispute the State's claim that it diligently enforced its model statute. In the Auditor's Notice of Final Calculation for MSA Payments Due April 15, 2006, dated March 29, 2006 (Notice ID: 0198), the Auditor noted:

> Additionally, the Independent Auditor has received disputes from **some PMs** denying that some Settling States have "continuously had a Qualifying Statute in full force and effect during the entire calendar year immediately preceding the year in which the payment in question is due [1999-2005], and diligently enforced the provisions of such statute during such entire calendar year" (subsection IX(d)(2)(B) of the MSA). The Settling States do not agree with this position. Until such time as the parties resolve this issue or the issue is resolved by a trier of fact, the Independent Auditor will not modify its current approach to the application of the NPM Settlement Adjustment.

Notice ID: 0198, pp. 4-5 (emphasis added).

Tobacco Co. v. Reilly, 533 U.S. 525, 533 (2001); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). The MSA's purpose was to settle claims brought by the States against the tobacco manufacturers on terms that would "achieve for the Settling States and their citizens significant funding for the advancement of public health" and "the implementation of important tobacco-related public health measures." (MSA Section I, Recitals). The funds to accomplish these critical public policy goals are to be provided by the PMs' payments under the MSA. However, allowing PMs to withhold States' money while attempting to force the State and the other Settling States to litigate this issue in a single nationwide arbitration proceeding before three federal arbitrators violates the purpose of this MSA.

The State has had some of the moneys owed to it from the PMs withheld from the April 17, 2006 payment. Moneys were also withheld from the April 15, 2007 payment. This issue has been in litigation since the State filed its Motion for Declaratory Judgment on April 19, 2006. Because the PMs are insisting on resolving the diligent enforcement issue before one nationwide panel of arbitrators, the arbitration has not commenced as of this date and is not expected to start until December 2009. This arbitration will be to resolve the diligent enforcement for the year 2003. Assuming that the Auditor refuses to determine whether the State has diligently enforced its statute in 2004, and in future years, even though the Auditor is expressly required to do so under the plain language of the MSA, then the State will be forced to go through the same procedure for the year 2004 and every year thereafter. That will be a result that no party to the MSA contemplated, negotiated, bargained for and agreed to. This State specific issue should be decided in a proceeding between every State that has been determined to have diligently enforced its model statute and those

PMs who dispute that decision. That is the way it was supposed to work; that is what the MSA provides; and that is what the parties agreed to.

There is not a phrase or a word in the MSA that requires the State or any of the other Settling States to participate in a single nationwide arbitration in order to determine whether the State diligently enforced its model statute. In fact, as previously stated, the words, "single nationwide arbitration," do not appear anywhere in the MSA. The PMs have effectively argued and convinced the State that the Auditor is mandated and required under the provisions of the MSA to determine whether or not the State diligently enforced its model statute. The Auditor has refused to carry out its responsibility in that regard and has decided that it will presume that every State has diligently enforced its model statute in order to deny the application of the NPM adjustment to the PMs' April 17, 2006 payments to the Settling States. While the Auditor's decision to deny the applications of the NPM Adjustment to the PMs' payments on that basis is arbitrable, the PMs interpret the MSA as requiring the State and all the other settling States to participate in a single nationwide arbitration proceeding before a panel of three former federal judges to determine whether the State and the other Settling States diligently enforced their model statute, without the State or any of the Settling States actually getting a decision from the Auditor as to whether they did or did not diligently enforce their model statutes. Such an interpretation by the PMs, if upheld by this Court, would permit the Auditor to effectively veto the procedure that was set forth in the MSA to allow a State to show to the Auditor that it diligently enforced its model statute and the procedure to provide for arbitration by those PMs that disputed the Auditor's decision as to any such State. Consequently, the State and the other settling States have been without the benefits of the money that has been withheld from them as a result of this dispute and according to the PMs, the State can not expect for the arbitration

proceedings to even commence before December of 2009. After the nationwide arbitration proceedings commence, it's anticipated that it will take a year to finish. The State and the other Settling States have a contractual right under the MSA to have a quick and expedited decision from the Auditor as to whether the State and the other Settling States did or did not diligently enforce their model statutes. Thereafter, the MSA provided for an arbitration proceeding that could be completed within a six month period at the maximum.

The State has set forth in its Motion for Declaratory Judgment, that was filed in the lower Court, one hundred and three separate paragraphs, not including sub-parts, what it contends that it has done to diligently enforce its model statute in 2003. The PMs have refused to admit or deny the State's allegations in regard to its diligent enforcement of its model statute. The fact is that the State has diligently enforced its model statute as provided in the MSA and is entitled to the NPM exemption. The State has absolutely no reason to delay arbitrating this matter as contemplated in the MSA. The PMs have refused to even offer a minimal basis for their belief that the State was not diligent. The PMs simply contend that because the Auditor presumed that the State diligently enforced its model statute, the State is required to participate in the single nationwide arbitration proceeding on the basis that the State, along with the other Settling States, constitute one side to the dispute as to whether the State diligently enforced its statute.

This Court should reverse the lower Court's decision and remand this case to the lower Court with directions that the PMs and the State move forward with arbitration by ordering the PMs to choose an arbitrator immediately so that the State could in turn choose its arbitrator and move forward with the arbitration process. The chosen arbitration panel then can decide procedural issues, including the scope of the arbitration and issues to be presented. (*See Employers Ins. Co. of Wausau*

v. Century Indemnity Co., 443 F.3d 573, 581 (7th Cir. 2006) (holding that under the Federal Arbitration Act, the issue of consolidation of arbitrations involving multiple disputes is a procedural issue, and therefore a decision reserved for the arbitrator). The arbitrators may refer the dispute as to diligent enforcement back to the Auditor for the Auditor's decision as required under the MSA. What the PMs have been able to do is to skip the Auditor on these issues and take the dispute directly to the single Nationwide Arbitration panel. The Auditor actually does not get to make a determination or a decision. The PMs have been able to convince the Courts to do this by asserting that the dispute arises out of a decision that the Auditor is required at sometime to make and even though the Auditor did not make the determination or decision, the dispute is still arbitrable before a single Nationwide Arbitration panel of three former federal judges.

VIII. THE CIRCUIT COURT DID NOT RULE ON THE EFFECT OF THE JUNE 2003 AGREEMENTS REGARDING THE 2003 NPM ADJUSTMENT

Upon a complete review of the lower Court's Order, the Court does order that the underlying dispute regarding the Auditor's refusal to apply the NPM's adjustment including the State's claim that it diligently enforced its model statute must be arbitrated in a single nationwide arbitration proceeding before a nationwide panel of three former federal judges, but it does not mention, refer to, or address the State's contention that the June 2003 Settlement Agreements effectively released the OPMs' right to an NPM Adjustment for the year 2003.[11] The OPMs assert that the State's claim must be arbitrated for the same reasons that the rest of the parties' dispute regarding the 2003 NPM Adjustment must be arbitrated. The State disputes that contention, because the 2003 Settlement

[11] The separate Settlement Agreements with releases were with OPMs Philip Morris, RJR, and Lorillard. The Settlement Agreements with the SPMs do not contain similar releases. The SPMs did not address this issue in their brief.

Agreements were negotiated and agreed to separate and apart from the MSA and did not incorporate the provisions of the MSA into those agreements. More importantly, the 2003 Settlement Agreements do not contain their own arbitration clauses in the event there is a dispute as to the legal effect of those agreements. These Settlement Agreements have absolutely nothing to do with a decision of the Auditor and what is at issue is an interpretation of those Agreements to determine whether the releases therein set forth apply to the OPMs' 2003 NPM Adjustment claim. The State contends that this a proper issue for the Circuit Court to determine. The fact that the lower Court did not reference this issue in its Order deprives this Court of the Circuit Court's thinking as to why the 2003 Settlement Agreements should be arbitrable the same as the other issues are arbitrable, and therefore denies this Court the opportunity to conduct meaningful review of the lower Court's decision.

The State has consistently argued that the arbitration provisions in the MSA are strictly limited to the Auditor's calculations and determinations. While the language in the Auditor's arbitration provision is broad, it does not extend beyond calculations, determinations, or decisions made by the Auditor. The specific language in the Auditor's arbitration provision is as follows:

> (c) Resolution of Disputes. Any dispute, controversy or claim arising out of or relating to calculations performed by, or any determinations made by, the independent Auditor (including, without limitation, any dispute concerning the operation or application of any of the adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX(j) or subsection XI(i)) shall be submitted to binding arbitration before a panel of three neutral arbitrators, each of whom shall be a former Article III federal judge. Each of the two sides shall select one arbitrator. The two arbitrators so selected shall select the third arbitrator. The arbitration shall be governed by the United States Federal Arbitration Act.

MSA § XI(c) (page 88).

A determination as to whether the June 2003 Agreements bar the 2003 NPMs' Adjustment based upon the settlement provisions of those agreements and the releases therein contained does not pertain to any dispute, controversy or claim, arising out of or relating to calculations performed by or any determinations made by the Auditor. In fact the Auditor was not a party to the June 2003 Settlement Agreements and had nothing to decide in regard to those Settlement Agreements.

The Auditor, in its Notice of the Final Calculation for the Payments due April 15, 2004, confirmed that it is not authorized or required under the MSA to decide the parties' dispute as to the June 2003 settlement agreements by stating:

> We have been provided with copies of agreements which were entered into in 2003 by and among the Settling States and certain Participating Manufacturers (the "2003 Agreements"). The 2003 Agreements relate to claims or potential claims of entitlement to NPM Adjustments and related disputes as between the parties to the respective 2003 Agreements. As you are aware, the 2003 Agreements do not amend the MSA. Further the Independent Auditor is not a party to the 2003 Agreements and our engagement does not extend to the provisions of the 2003 Agreements, nor do the 2003 Agreements amend our role as Independent Auditor.

3/29/06 Notice of Final Calculation (Ex. L at 1 to OPM's Memo) R. 79.

The interpretation of those Settlement Agreements under the structure of the MSA as previously briefed in this case is reserved solely for each State's MSA Court.

The State contends that the Auditor's dispute provisions in the MSA that require binding arbitration are not applicable to the June 2003 Settlement Agreements.

IX. THE LOWER COURT SHOULD HAVE HELD THAT 2003 SETTLEMENT AGREEMENTS RESOLVED THE ISSUE OF THE STATE'S DILIGENCE IN CALENDAR YEAR 2003

Properly framed, the underlying issue concerning the June 2003 Settlement Agreement is whether the State, which had an NPM escrow statute in full force and effect during calendar year

2003, diligently enforced the provisions of such statute **during such entire calendar year**. The MSA plainly provides that, while the amount of a tobacco company's payment in a particular year is calculated by reference to the company's sales during that year, the tobacco company's entitlement to an NPM adjustment turns not on a state's diligent enforcement **with respect to sales during that year**, but rather on a state's diligent enforcement **during that year**. The issue, then, is whether the State diligently enforced its NPM escrow statute during calendar year 2003. This distinction, though subtle, is dispositive.

The State's NPM model statute imposes an obligation on NPMs to make payments into escrow "by the fifteenth day of April of the year following the year [in which the cigarettes were sold]." W. Va. Code § 16-9B-3(b)(1). As explained more fully in the State's brief, the first date that there were escrow obligations for the State to "diligently enforce," with respect to cigarettes sold in 2003, was April 15, 2004. Therefore, the question of whether the State diligently enforced the statute during calendar year 2003 could only be with respect to cigarettes sold from 1999 to 2002.

That is precisely the issue that was resolved in 2003 in settlement agreements between the State, on the one hand, and Philip Morris, RJR, and Lorillard, on the other. Those agreements provide that each tobacco company absolutely releases and forever discharges the State from any and all monetary claims that it ever had, now has, or hereafter can, shall or may have under Section IX(d) of the MSA the provision providing for the NPM Adjustment **with respect to cigarettes shipped or sold in 1999, 2000, 2001, and 2002, including any effect such monetary claims may have on future payments under the MSA**.

The PMs contend that it is unnecessary to determine whether the NPM Adjustment is based upon sales from 2002 or 2003 because paragraph 8 of the 2003 Agreements expressly acknowledge

that there continues to be a dispute with respect to potential NPM Adjustments relating to cigarettes shipped or sold in 2003 and subsequent years. This argument contains two errors.

First, the PM's framing of the issue as whether the NPM Adjustment is based upon sales from 2002 or 2003 misses the critical language from the MSA discussed above. Properly understood, the NPM adjustment is based **neither** upon sales from 2002 **nor** upon sales from 2003. Rather, the NPM Adjustment is based upon the State's diligent enforcement **during** 2003, during such entire calendar year.

Second, even if the NPM Adjustment were based upon diligent enforcement with respect to cigarettes sold during a year, rather than simply the State's diligent enforcement during that year, it **would** not be necessary to decide whether the appropriate year is 2002 or 2003, because the tobacco companies only reserved the right to dispute the State's diligence with respect to cigarettes shipped or sold in **2003**. In other words, any choice between 2002 and 2003 was, indeed, squarely presented for the lower Court's resolution, because the tobacco companies only reserved the right to dispute the State's diligent enforcement with respect to cigarettes sold in 2003.

Moreover, because it is indisputably true that the State could not, **during calendar year 2003**, enforce its escrow statute with respect to 2003 cigarette sales, any decision between 2002 and 2003 is not really a close one. The only escrow obligations that were there to be enforced, **during calendar year 2003** (during such entire calendar year), were with respect to cigarettes sold in 2002 and before. Again, that is the precise issue that was settled in the 2003 agreements.

It was the proper role of the Circuit Court, under state law, and under the MSA itself, to interpret and apply the unambiguous language in the 2003 release agreements. Even when a claim is subject to an arbitration agreement, the issue of whether a party has, through a subsequent

agreement, released that claim, is not subject to arbitration. A court, not an arbitration panel, should resolve the threshold issue of whether a party, through a subsequent agreement, unambiguously released the claim, as the tobacco companies unambiguously released the claim at issue here. *See Continental Cas. Co. v. LaSalle Re Ltd.*, 511 F. Supp. 2d 943 (N.D. Ill. 2007).

X. THE JUNE 2003 SETTLEMENT AGREEMENTS DO NOT MEET THE PMS' DEFINITION OF "EACH SIDE" TO CHOOSE AN ARBITRATOR

The issue over the 2003 Settlement Agreements is between the States and the OPMs; Philip Morris, RJR and Lorillard. The SPMs did not include releases in their Settlement Agreements similar to the releases in the OPMs' Settlement Agreements. Therefore, the interests of the OPMs and the SPMs are not the same in this dispute. In fact, the SPMs did not even address this issue in their brief. The SPMs do not have the unity of interest with the PMs that exist in the diligent enforcement issue. Therefore, each side does not include all of the PMs as constituting one side in this dispute. The same can be said for many other SPM disputes with the Auditor's determinations that do not include the OPMs. (*See* Exhibit 1 and Exhibit 2 to the SPMs' Joinder in PMs' Motion to Compel Arbitration & to Dismiss or to Stay Litigation, R. 60-78.) The same is true with disputes with one or more of the OPMs that do not include the SPMs.

Accordingly, even if the Court were to determine that the disputes over the releases is arbitrable, the arbitration proceeding should not be one nationwide arbitration proceeding.

XI. CONCLUSION

For all of these reasons, the Circuit Court of Kanawha County should be reversed and the case should be remanded to the Circuit Court with appropriate instructions as to the current disputes that the State agrees are arbitrable. The State is asking this Court to direct the parties to proceed with

the arbitration with the State being one side to the dispute and being permitted to select its arbitrator.

The State asks that it be granted such other and further relief as is just and proper.

Respectfully submitted,

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NO. 33873

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DARRELL V. McGRAW, JR., ATTORNEY GENERAL, *ex rel.* STATE OF WEST VIRGINIA; THE WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY; and THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Appellants/Plaintiffs Below,

v.

THE AMERICAN TOBACCO COMPANY, *et al.*,

Appellees/Defendants Below.

CERTIFICATE OF SERVICE

I, Ronald R. Brown, Assistant Attorney General, do hereby certify that true copies of the foregoing "Appellant's Reply to OPMs' Brief and SPMs' Brief " were served upon the following by U.S. Mail, this 1st day of December, 2008, addressed as follows:

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